

# **“Medical Diagnosis, Not Sex or Gender Identity”: Transgender Equality and the Neutral Application Problem**

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## **1. TWO FORMS OF THE NEUTRAL APPLICATION DEFENSE**

*The Equal Application Defense:* Differential treatment can be justified by appeal to an alternative, facially neutral underlying difference that is claimed to be shared by all.

*Adams v. School Board of St. Johns County*, 57 F.4th 791 (11th Cir. 2022) (en banc): A trans-exclusionary school bathroom policy does not discriminate against trans students based on transgender status because it applies to trans and cis students all the same.

*L.W. v. Skrmetti*, 83 F.4th 460 (6th Cir. 2023): It is not sex discrimination to prohibit gender-affirming care for trans youth because the ban applies to “all minors, regardless of sex.”

*The Unique Application Defense:* Differential treatment can be explained away altogether by appeal to an alternative, facially neutral underlying difference that is claimed to be unique but not universal to a specific category of persons.

*Doe 2 v. Shanahan*, 755 F. App’x. 19 (D.C. Cir. 2019): The Trump administration’s trans military ban was not discrimination against trans persons as such because “not all transgender persons seek to transition to their preferred gender [sic] or have gender dysphoria.”

R&R in *Toomey v. Arizona*, No. 19-cv-35 (D. Ariz. Nov. 30, 2020): Insurance exclusion of gender-affirming surgery merely “discriminates against persons seeking gender transition surgery,” not “transgender people in general,” because “while all persons seeking gender transition surgery are transgender, not all transgender persons seek gender transition surgery.”

State defendants’ argument in *B.P.J. v. West Virginia State Board of Education*, No. 23-1078 (4th Cir. Apr. 26, 2023): prohibiting trans girls, but not cis girls, from participating in girls’ sports is neither differential treatment of trans girls relative to cis girls, nor differential treatment of trans students relative to cis students.

**My view:** There is no good response to the neutral application defense currently on offer.

*Problem:* The two forms of the neutral application defense foreclose every conceivable way in which a claim of transgender discrimination may be raised under the dominant conceptual framework of U.S. gender equality law.

*Diagnosis:* The assumption that transgender discrimination requires differential treatment *across* the sexes as we know them is perfectly consistent with, if not directly implied by, the dominate conception of gender equality in U.S. law.

*Solution:* I want to present a trans feminist alternative, which I defend by showing that it cleanly bypasses the neutral application defense.

## 2. THE NEUTRAL APPLICATION PROBLEM

*The differences conception:* Equality is the elimination of differential treatment unjustified by real underlying differences. This has two implications:

- a) Differential treatment, where justified by real underlying differences, is perfectly consistent with the requirements of equality → the equal application defense (see, e.g., *Adams, L.W.*, and *Eknes-Tucker*; but cf. *Loving, J.E.B., Lawrence*, and *Bostock*).
- b) Moreover, where the justification works just a bit too well, differential treatment may disappear altogether → the unique application defense (see, e.g., *Dobbs, Geduldig, Bray, Shanahan, Toomey, Iglesias*, and *B.P.J.*).

**My worry:** There is no adequate way to respond to the neutral application defense under the differences conceptions.

*Empirical adequacy:* The response must not characterize trans persons, gender dysphoria, gender-affirming care, etc., in ways that fail to respect trans people’s lived gender realities.

*Extensional adequacy:* The response must count paradigmatic cases of transgender discrimination as (direct) discrimination based on both sex and transgender status.

*Explanatory adequacy:* The response must provide plausible and principled reasons for why these paradigmatic cases of transgender discrimination are indeed (directly) based on sex and transgender status despite the neutral application defense’s argument to the contrary.

Explanatory adequacy, as I understand it, requires empirical and extensional adequacy.

### STRATEGY I: THE DEFINITIONAL RESPONSE

Transgender discrimination is not neutral on sex and transgender status because it is impossible to write a trans discriminatory statute entirely in *prima facie* sex- and gender-neutral terms.

The Plan does not merely exclude one “objectively identifiable physical condition with unique characteristics” from coverage; rather, it excludes *treatments* that lead or are connected to *sex* changes or modifications. Pregnancy can be explained without reference to sex, gender, or transgender status. The same cannot be said of the exclusion at issue here.<sup>1</sup>

Extensional & explanatory adequacy:

Pregnancy discrimination is still a form of sex discrimination even if the physical state of being pregnant can be explained in *prima facie* sex- and gender-neutral terms.

It also seems possible to redescribe many, though arguably not all, forms of transgender discrimination in *prima facie* sex- and gender-neutral terms.

Empirical adequacy: The definitional response finds sex, gender, and transgender status in gender-affirming care only by essentializing gender and pathologizing trans people.

1. *Kadel v. Folwell*, 620 F. Supp. 3d 339, 378–79 (M.D.N.C. 2022) (emphasis in original), *appeal docketed*, No. 22-1721 (4th Cir. July 8, 2022), *reh’g en banc granted sua sponte*, No. 22-1721 (4th Cir. Apr. 12, 2023).

## STRATEGY II: THE LEVEL-OF-GENERALITY RESPONSE

The pathologization and essentialization implicit in the definitional response may be avoided by casting gender-affirming care at a high level of generality such that the care is not unique to trans persons (e.g., gender-affirming estrogen for cis women, chest reduction surgery for cis men).

Florence Ashley: gender dysphoric experiences, gender euphoria, and creative transfiguration.

But this invites the equal application defense → not extensionally or explanatorily adequate.

To avoid the equal application defense, gender-affirming care needs to be considered at a low level of generality such that the discrimination does not come out as equally applicable across the board, which then runs head-on into the unique application defense.

## STRATEGIES III & IV: TWO COUNTERFACTUAL RESPONSES

*The counterfactual comparator response:* "To know whether Crusoe treats Friday 'differently' when he refuses to collaborate with him, we need to ask how Crusoe would treat other imaginary candidates for collaboration, imaginary candidates who are not black but are otherwise (so far as possible) just like Friday" (John Gardner, "Discrimination: The Good, the Bad, and the Wrongful").

Extensional & explanatory adequacy: What would it mean to imagine cisgender youth whose sex assignment at birth does not align with whom they authentically are, who therefore seek but are denied access to gender-affirming care?

*The counterfactual comparee response:* Discrimination against trans people is discrimination on the basis of sex, because, holding everything else fixed, we would not receive the differential treatment if our sex assignment at birth were different (*Bostock v. Clayton County*).

Similarly, discrimination against trans people is also discrimination on the basis of transgender status because, again holding everything else fixed, we would not receive the differential treatment if we were not transgender.

Extensional & explanatory adequacy: intersectional discrimination against trans women; discrimination against nonbinary persons.

## STRATEGY V: THE SEX-Stereotyping Response

*Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004): Employment discrimination against a trans woman constitutes discrimination "against men [sic] because they *do* wear dresses and makeup, or otherwise act femininely."

Empirical adequacy: The analysis is premised on the idea that the gender norms applicable to trans people are those operative under dominant cultural spaces and social structures.

Many trans women do not think of ourselves as gender-nonconforming even though our bodies would not be seen as consistent with our authentic sense of self by the dominant cisheterosexual world, because the gender norms available to us from our own cultures and communities regard bodies like ours as unproblematically if not paradigmatically *female*.

Even when we do conform to gender norms that would be coded as feminine in the dominant world, many trans women still do not think of ourselves as gender-nonconforming because it is the dominant norms of *masculinity* that are inconsistent with our authentic sense of self.

Explanatory adequacy: It’s as if trans women really are just “biological males” courageous enough to subvert the dominant norms of masculinity imposed onto us from birth, as if it really is our frivolous pursuit of “dresses and makeup” that’s at the bottom of our discrimination.

Extensional adequacy: The sex-stereotyping approach protects only the exceptional—women who receive adverse employment actions because of their noncompliance with femininity—but not the majority—those subject to adverse employment actions precisely because of their femininity.

### 3. A TRANS FEMINIST ALTERNATIVE

*MacKinnon’s insight:* Sex discrimination occurs not because and when some persons are treated differently from their similarly situated counterparts on the basis of sex construed as a biological difference, but because and when they are systematically (i.e., nonaccidentally) disadvantaged by the social meaning of that purported biology—that is, *gender*.

*Haslanger’s approach:* Gender categories are a powerful tool for analyzing gender in its social meaning. My formulation/revision of Haslanger’s account:

*Gender categories:* A category is gendered (for critical feminist analytical purposes) if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is “marked” as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a certain (present, previous, or future) body socially interpreted as sexed one way or another.

**My proposal:** The best interpretation of the MacKinnon-Haslanger approach should acknowledge that the gender categories useful for critical feminist analytical purposes need not be limited to the genders *that we know of*, and that these analytical categories need not constitute the kind of building blocks important to the construction of our authentic selves.

The interpretation of bodies as trans represents a family of ways in which bodies may be interpreted socially as sexed: as gender-disordered, as inconsistently/insufficiently/clockably/unexpectedly/confusingly/upsettingly/disgustingly male or female, etc.

*Persons diagnosed with gender dysphoria and persons seeking gender-affirming care* are subordinate gender categories for critical feminist analytical purposes, and discrimination against them is *ipso facto* based on both sex and transgender status.

The neutral application defense can’t even get going here (consider the trans military ban):

The equal application defense fails because equal application does not erase substantive disadvantages (indeed, equal application may itself enable substantive disadvantages).

The unique application defense fails because the interpretation of bodies as gender-disordered is among the many ways in which bodies are read socially as trans.